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under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether, as found by both courts below, a $2.00 weekly "attendance bonus," granted by petitioner to its employees as part of a wage increase, is a part of the regular rate of pay within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provision of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 201, is as follows:

> Sec. 7 (a). No employer shall * * * employ any of his employees [who are subject to the Act] * * * for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of * * * [forty hours] at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

Petitioner operates thirteen textile mills and employs approximately 9,000 employees who are admittedly subject to the Fair Labor Standards Act (R. 3, 11). In August 1942 petitioner, in order to retain its employees in a highly competitive labor market, found it necessary to meet a general wage increase of 7½ cents per hour in the industry (Fdg. 2, R. 241). As a result, a

direct wage increase averaging 2.6 cents per hour was agreed upon, and the balance of the necessary increase was supplied by the payment "as a part of the company's wage advance" of a bonus of $2.00 per week to each employee who worked all the hours required of him in any week (Fdg. 3, R. 242). The bonus, which was devised to discourage absenteeism and thereby stimulate increased production (Fdg. 4, R. 242–243), was termed by company officials a "bonus for a full week's work," and was so described in the initial announcement to the employees as well as in subsequent announcements of wage increases (Fdg. 6, R. 243; R. 25, 30–31, 73–77). Although, at the suggestion of the company's attorneys, an indorsement on the reverse side of each employee's pay check referred to an "overtime bonus," this indorsement also stated that the bonus would be paid even "in any week [when] no overtime hours are worked by his department" provided that the employee "actually works in such week the full number of hours his department operates" (R. 12–13, 85–86; Fdg. 6, R. 243–244). The bonus was in fact paid in non-overtime workweeks when only 40, 38, 32, 24 or 8 hours were worked if only that number of hours was required in that week (R. 55–59, 98, 109, 131, 135; Fdg. 8, R. 245). The district court specifically found as a fact that the bonus was not promulgated as an overtime bonus but as a bonus for doing full-time work (Fdg. 6,

R. 244), and that it became a part of the normal and regular compensation of an employee who worked the full weekly hours required in weeks when no overtime was worked as well as in overtime weeks (Fdg. 8, R. 245).

Petitioner treated the bonus as wages for the purpose of computing social security taxes, unemployment taxes, and withholding taxes (Fdg. 5, R. 243). It did not, however, include the bonus as a part of the employees' regular rates of pay, or reflect it in any way in its overtime payments (Fdg. 10, R. 246–247).

The Administrator brought this suit in 1945 to enjoin petitioner's failure to include the bonus in computing the regular rate of pay and to enjoin the shipment in commerce of goods produced by employees who had not received overtime compensation based on a rate which included the bonus (R. 2). A motion for preliminary injunction, which if granted would have prevented petitioner from shipping in commerce goods then in its possession, was filed contemporaneously with the complaint (R. 7). This motion was dismissed upon the stipulation of the parties that "If, on the final determination of this case, the Court sustains the plaintiff's position * * * (a) The defendant hereby formally agrees to make payment to its affected employees of all back wages due * * *" (R. 7–8). After trial the district court found that "the bonus plan was a contractual arrangement

under which the employees became legally entitled to the $2.00 payment by working the required weekly hours," that the "bonus was intended to be and was in fact, a part of the general increase in wages," and that from its inception "it was a normal and regular part of the employees' weekly compensation, being paid without regard to whether the week was an overtime or a non-overtime week" (R. 243, 244, 247). The court, however, concluded that an injunction was not needed because the bonus plan had been discontinued. It denied the injunction but ordered the company to pay the back wages due under the stipulation (R. 251). An appeal was taken by the company.

The circuit court of appeals affirmed the judgment, stating that "the evidence taken as a whole fully supports the court's finding that there was no contractual agreement between appellant and its employees that the bonus was an overtime bonus and not a part of 'the regular weekly rate'" (R. 264). "Indeed," said the court, "we doubt whether a finding the other way could have been sustained" (*Ibid.*). "It, therefore, is quite plain," concluded the court, "that *Belo's* case, on which appellant relies, is without application here" (*Ibid.*).

ARGUMENT

The holding of both courts below that the attendance bonus should have been included as an element of the regular rate of pay follows the decisions of this Court and accords with those of

the circuit courts of appeals. The bonus payments here were made pursuant to contract in lieu of a wage increase. They were "payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments" (*Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 424), and therefore clearly "a part of the normal weekly income" and "an ingredient of the statutory regular rate." *Walling* v. *Harnischfeger Corp.*, 325 U. S. 427, 431. See also *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C. C. A. 2), certiorari denied, 328 U. S. 870; *Walling* v. *Garlock Packing Co.*, 159 F. 2d 44 (C. C. A. 2), certiorari denied, 331 U. S. 820; *Walling* v. *Wall Wire Products Co.*, 161 F. 2d 470 (C. C. A. 6), certiorari denied, 331 U. S. 828; *Walling* v. *Stone*, 131 F. 2d 461 (C. C. A. 7).

Petitioner's contention that the bonus should be regarded as additional overtime compensation rather than as part of the basic rate is predicated upon the indorsement on the pay checks which referred to the additional weekly payment as an overtime bonus, and upon the erroneous assumption that under *Walling* v. *Belo Corp.*, 316 U. S. 624, the mere denomination of a payment as "overtime" fixes its character.[1] Both courts be-

[1] It is significant that the very court of appeals which decided the *Belo* case found it "quite plain that *Belo's* case * * * is without application here" (R. 264).

low found, however, in view of other language in the indorsement and numerous other notices sent to employees, that the isolated statement in the indorsement was not the equivalent of a contractual agreement that the bonus was for overtime (R. 244, 264). The fact that the bonus was paid for normal non-overtime hours of work establishes that it was a part of the regular rate, contract terminology to the contrary notwithstanding. See *Walling* v. *Helmerich & Payne,* 323 U. S. 37; *Walling* v. *Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419; *Walling* v. *Harnischfeger Corp., supra; 149 Madison Ave. Corp.* v. *Asselta,* 331 U. S. 199, 205, 209–210.[2]

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[2] The petition (pp. 22–23) raises two subsidiary points (based on the "*de minimis*" doctrine and the Portal-to-Portal Act of May 14, 1947, Pub. Law 49, 80th Cong., 1st Sess.) which, although fully briefed and argued in the court below, apparently were not considered of sufficient consequence to require comment. Even if it be assumed that petitioner is not estopped from raising these points in view of its having obtained a withdrawal of the motion for preliminary injunction in return for its agreement to pay back wages in the event the bonus was held part of the regular rate (see *Davis* v. *Wakelee,* 156 U. S. 680; *Penny Stores* v. *Mitchell,* 59 F. 2d 789 (statutory three-judge court, S. D. Miss.)), its contentions on both points are groundless.

In support of its "*de minimis*" argument, petitioner relies on *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U. S. 680, 692, in which this Court stated that the "*de minimis*" doctrine might apply to the few seconds or minutes spent in preproduction activities where precise calculation is not easily obtainable. This clearly has no application to the determination of the regular rate, which may be ascertained as a "matter of mathematical computation." *Walling* v. *Youngerman-*

CONCLUSION

The decision below is plainly correct. The petition presents no questions of substance not

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Reynolds Hardwood Co., supra, p. 425. Since the bonus here in question was the greater part of the wage increase, petitioner is in the peculiar position of contending that the greater portion of the increase paid as a bonus should be considered "*de minimis*," notwithstanding the fact that it recognized that the smaller portion should be included in the regular rate.

Petitioner, having failed to include the bonus in the regular rate since the inception of the plan in 1942, now suggests that under Section 9 of the Portal-to-Portal Act such failure was "in good faith in conformity with and in reliance on" a War Labor Board approval of a wage increase in 1944. Since petitioner's practices in this respect antedated the War Labor Board action and were unchanged thereafter, the claimed defense under the Portal-to-Portal Act is unavailable. Furthermore, petitioner nowhere suggests that the Board issued "any administrative regulation, order, ruling, approval, or interpretation" or had "any administrative practice or enforcement policy," which purported to pass on the question whether the bonus was part of the "regular rate" under the Fair Labor Standards Act. As appears from the undisputed evidence in the record and the findings of the trial court, "no approval was in fact given to said plan" by the Board (Fdg. 14, R. 248; R. 174) and "even if the Board had attempted to approve said plan, it was in fact without authority to do so" (R. 248; see War Labor Disputes Act of June 25, 1943, 57 Stat. 163, Sec. 7 (a) (2), 50 U. S. C., App., Supp. V, 1507 (a) (2); Stabilization Act of 1942, 56 Stat. 765, Sec. 4, 50 U. S. C., App., Supp. V, 964; Executive Order 9250, 7 F. R. 7871, as amended by Executive Order 9381, 8 F. R. 13083). Where, as here, the defenses provided by the Portal-to-Portal Act are patently inapplicable, there is no occasion for remand to permit their presentation. Cf. *Rutherford Food Corp.* v. *McComb*, 331 U. S. 722, petition for rehearing (request for remand under the Portal-to-Portal Act) denied, October 13, 1947.

already settled by this Court and should, therefore, be denied.

Respectfully submitted.

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